

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Petition for Rulemaking )  
of Pacific Bell Mobile Services )  
Regarding a Plan for Sharing )  
the Costs of Microwave Relocation )

RM-8643

**REPLY**  
**OF THE ASSOCIATION OF AMERICAN RAILROADS**

The Association of American Railroads ("AAR"), by its attorneys and pursuant to Section 1.405 of the rules of the Federal Communications Commission ("the Commission"), hereby replies to comments addressing the Pacific Bell Mobile Services ("Pacific Bell") Petition for Rulemaking Regarding a Plan for Sharing the Costs of Microwave Relocation, filed May 5, 1995 ("Pacific Bell Petition"). AAR has actively participated in this proceeding to represent the interests of its members, who operate licensed microwave facilities in the 2 GHz band which are essential to the safe operation of the nation's railroads.

**I. The PCIA Plan Recognizes the Need to Maintain Integrity of Microwave Systems**

In commenting on the Pacific Bell Petition, several PCS licensees<sup>1/</sup> joined the Personal Communications Industry Association ("PCIA") (collectively, the "PCS Licensees") in

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<sup>1/</sup> The PCIA Comments were joined by Ameritech, American Personal Communications, BellSouth Wireless, Inc., Omnipoint Communications, Pacific Bell Mobile Services, and Western PCS Corporation.

proposing a cost sharing plan (the "PCIA Plan") which would modify the Pacific Bell plan in several key respects. AAR concurs with the PCS Licensees' proposal to require 100 percent reimbursement of a PCS licensee by other PCS licensees for its costs of relocating microwave links not operational in its licensed PCS service areas or spectrum bands. The PCS Licensees correctly surmise that this aspect of the PCIA Plan will beneficially increase the likelihood that microwave licensees will not be forced to engage in repeated negotiations with different PCS licensees as the incumbent system is moved piecemeal to various bands. In this respect, the PCIA Plan recognizes microwave licensees' entitlement to minimal disruption of their operations.

**II. Later PCS Licensees Need Not Share Rapid Relocation Premiums, but Other Relocation Payments Should Not be Capped**

The PCS Licensees suggest that the Commission impose a cap of \$250,000, plus an additional \$150,000 if a new tower is necessary, upon the costs which subsequent PCS licensees would pay to the initial licensee which relocates microwave facilities.<sup>2/</sup> The PCS Licensees propose that, if the payments for relocation exceed that amount, the microwave licensee would be paid by the initial relocater, but the initial relocater could

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<sup>2/</sup> PCIA Comments at 5, 12.

not obtain reimbursement from other PCS licensees unless such payments were negotiated in advance.<sup>3/</sup>

Under the PCIA Plan, any cap upon payments to be shared by PCS licensees will tend to reduce the amounts paid to the microwave licensee because the initial relocater could not obtain proportionate reimbursement above the arbitrary amount of the cap. The PCS Licensees assert that the reason for the cap is to give PCS providers an incentive to "control costs responsibly."<sup>4/</sup> That objective is laudable, but it must be attained only while ensuring that microwave licensees are nonetheless made whole. The PCS Licensees appear to be concerned about premiums paid to microwave licensees in exchange for their agreement to accept relocation at an expedited pace.<sup>5/</sup> Under the circumstances, the appropriate mechanism is not a cap on all payments shared by PCS licensees, but instead recognition that later PCS licensees need not share in the payment of any premiums paid by the initial relocater for rapid microwave relocation. The key distinction is between actual costs of the relocation and any premium, over and above those costs, which the initial

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<sup>3/</sup> *Id.* at 16 & n.12.

<sup>4/</sup> *Id.* at 16 (note omitted).

<sup>5/</sup> *See id.* (the cap ensures that "[a]ny substantial premium above the cap that is paid by a relocating PCS provider for an early relocation will be charged to the benefitting entity and will not burden those who enter the market later").

relocator may choose to make in return for expedited access to the band.

Consider the following two examples. In one scenario, the initial relocator pays the microwave licensee \$600,000 to be moved out of the band. This payment consists of \$200,000 for the actual costs incurred for relocation, and a \$400,000 premium in exchange for the microwave licensee's agreement to relocate on an expedited basis. In the second scenario, the initial relocator pays the microwave licensee \$600,000, but the actual costs of relocation are \$400,000, and \$200,000 is paid as a premium for expedited relocation.

In each case, the PCIA plan would limit costs shared by a second or third PCS licensee to \$250,000 (assuming no additional tower is required).<sup>6/</sup> Thus, in the first case, the PCIA Plan would require the later PCS licensees to pay the initial relocator \$50,000 of the premium that was paid for rapid relocation, even though these later entrants would not benefit from the expedited relocation. In the second case, the later PCS licensees would not assume \$150,000 of the bona fide costs of relocation, thus foisting that burden unfairly upon the initial relocator.

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<sup>6/</sup> The PCIA plan errs in accounting for potential need for new tower sites but ignoring other factors that can increase bona fide costs of relocation, such as the installation of fiber, high performance antennas, tower reinforcements, and the like.

The simple solution, if the Commission decides to adopt some limitation on sharing of relocation payments, is to provide that later PCS licensees need not reimburse the initial relocater for any premiums paid for expedited movement out of the band. This would avoid the inequities of the arbitrary cap and encourage the initial parties to clearly separate relocation costs from premiums, thus minimizing inappropriate division of payment sharing burdens.

### **III. The Voluntary Negotiation Period Must Not Be Shortened**

The Sprint Telecommunications Venture and BellSouth ask the Commission to shorten or eliminate the voluntary negotiation period.<sup>7/</sup> AAR respectfully urges the Commission to ignore these attempts to subvert the agency's carefully constructed rules. If the Commenters wish the Commission to effectuate their proposals, they should submit a petition or petitions for rule making, rather than raising these new issues in a comment round established to address the Pacific Bell petition.<sup>8/</sup> The Commission has repeatedly recognized that PCS providers' interest in early commencement of mandatory relocation proceedings must be balanced against the need to avoid disrupting essential microwave

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<sup>7/</sup> See Sprint Telecommunications Venture Comments at 5-6, BellSouth Comments at 6-7.

<sup>8/</sup> See 47 C.F.R. §§ 1.401(a), 1.405(a).

communications operations and the need to provide for an orderly transition and good faith and fair voluntary negotiations.<sup>9/</sup>

A reasonable voluntary negotiation period is necessary to ease migration difficulties in areas of spectrum scarcity, and to ensure a seamless transition without interruption of vital microwave communications.<sup>10/</sup> Sprint and BellSouth make unsubstantiated allegations that several microwave licensees seek to "exact tribute" for rapid relocation. These vague claims ignore the reality: microwave licensees cannot flick a switch and instantly leap to a higher band. New equipment must be purchased, paths coordinated, systems constructed, implemented and tested, personnel must be trained, and the system must be moved carefully, with backup routes maintained in case of initial failures. The agency's logical, rationally derived two year voluntary negotiation period must be retained as an absolute minimum to permit an orderly relocation process and maintain the integrity of the essential microwave communications links which support vital railroad operations throughout the nation.

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<sup>9/</sup> See Third Report and Order and Memorandum Opinion and Order, ET Docket No. 92-9, 8 FCC Rcd 6589, ¶¶ 4, 13, 16 (1993) (*Third Report and Order*); see also, e.g., Notice of Proposed Rule Making, 7 FCC Rcd 1542, ¶ 27 (1992) (*First Notice*); First Report and Order and Third Notice of Proposed Rule Making, 7 FCC Rcd 6886, ¶ 28 (1992) (*First R&O / Third Notice*);

<sup>10/</sup> See comments summarized in *Third Report and Order*, ¶ 10.

#### IV. Other Matters

AAR has no current objection to a microwave relocation clearinghouse such as that proposed by PCIA,<sup>11/</sup> but the proposal is currently vague and its future implementation could be flawed. AAR agrees with PCIA that the clearinghouse must be maintained so as to ensure that confidential information is protected.<sup>12/</sup> Although PCIA states that it will continue to work with the PCS industry to develop this clearinghouse plan, such a plan affects all involved in the transition. The determination of what types of information will be gathered, and to whom such data could be made available, must be an open process incorporating comment and balancing the needs of all parties. For example, microwave licensees should be permitted to inspect information regarding at least their own systems, regardless of membership in the clearinghouse, to ensure that an initial relocater does not incorrectly claim that it is withholding payments due while awaiting payment from other PCS licensees who are in fact not potential "interferers." The integrity of microwave licensees' competitively sensitive information and their right to access information about their own systems must not be infringed.

PCIA proposes rules to implement its plan. AAR assumes that, should the Commission adopt a payment sharing plan, it will craft its own rules. If it instead relies on the PCIA rules, AAR

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<sup>11/</sup> PCIA Comments at 17.

<sup>12/</sup> See *id.* at 18.

advocates the following changes. First, in paragraph (b), delete "another PCS provider" and replace with "a designated frequency coordinator or clearinghouse;" also replace "it" with "another PCS provider." There is no reason to permit PCS providers to escape the effect of the payment sharing plan by claiming that they did not realize they would create interference to the microwave operations. Second, delete "or by another industry accepted standard." There is no current "industry accepted standard" aside from the Bulletin 10-F procedures noted in Section 24.237 of the Commission's Rules. When other standards are developed, the Commission should recognize in its rules only those that in fact receive support from all parties. Third, in (c) and (d), delete "or \$250,000 (or \$400,000 . . . ), whichever is less." Such a cap on shared costs is inaccurate and inappropriate for the reasons set forth above.

## **V. Conclusion**

AAR assumes that the Commission will not revisit this territory, carefully and repeatedly mapped out by the agency in the past. The Wireless Telecommunications Bureau, like the Office of Engineering and Technology, is cognizant of the agency's well-developed precedent establishing a two year voluntary negotiation period prior to one year of mandatory negotiations, and leaving payment sharing to be determined only via informed negotiations between the parties involved. If the Commission seeks to interject additional regulation, for example



limiting the payments shared by future PCS licensees, AAR respectfully requests that those limits take the form of a limit on any premiums paid for early relocation, rather than an arbitrary across-the-board cap on the actual costs incurred in relocating essential microwave communications facilities.

Respectfully submitted,

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June 30, 1995

### CERTIFICATE OF SERVICE

I, Bridget Y. Monroe, a secretary with the law firm of Verner, Liipfert, Bernhard, McPherson and Hand, hereby certify that on this 30th day of June, 1995, a copy of Reply Comments of the Association of American Railroads of Pacific Bell Mobile Services Petition for Rulemaking was mailed, first class postage prepaid to the following:

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